IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

ROBERT KOLINEK, individually and on behalf of all others similarly situated, *Plaintiff*, *v*. WALGREEN CO., an Illinois corporation, *Defendant*.	Case. No. 13-cv-04806 Hon. Mathew F. Kennelly

PLAINTIFF KOLINEK'S RESPONSE TO WALGREENS' CITATION OF AUTHORITY

At oral argument on its motion to dismiss, the Court allowed for Defendant Walgreens to file a citation to the regulation adopted by the Federal Trade Commission ("FTC") exempting prescription refill reminder calls from violating the Telemarketing Sales Act. After initially filing a six-page brief that was stricken by the Court, Walgreens now points to an FTC regulation, the Telemarketing Sales Rule, setting out the exemption. *See* 16 C.F.R. § 310.4(b)(1)(v)(D). There are three reasons why the cited regulation is irrelevant and inapplicable to this case, and should not be considered.

Reason 1: The cited FTC exemption has absolutely nothing to do with the TCPA, the only statute at issue here. The FTC's Telemarketing Sales Rule (enacted pursuant to the Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. § 6102, *et seq.* (the "Telemarketing Sales Act"), not the TCPA) states that "[i]t is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer to…[i]nitiat[e] any outbound telephone call that delivers a prerecorded message…." 16 C.F.R. § 310.4(b)(1)(v). The exemption cited by Walgreens states that "[t]his paragraph (v) shall not apply to any outbound telephone call that delivers a prerecorded healthcare message by, or on behalf of, a covered entity or its business associate, as those terms are defined in [HIPAA]." 16 C.F.R. § 310.4(b)(1)(v)(D). While this regulation may very well exempt certain calls from the prohibitions of the Telemarketing Sales Act, it does not serve to exempt any calls from the TCPA. Plaintiff alleges a violation of the TCPA—not the Telemarketing Sales Rule—so the exemption simply does not apply here.

To the extent Walgreens is arguing that deference should be given to the FTC's exemption for these types of calls as it relates to Plaintiff's TCPA claim, the Court can give no such deference because the FTC is not the agency tasked with implementing the TCPA's rules and regulations. *See* 47 U.S.C. § 227(b)(2). That would be the Federal Communications Commission ("FCC"), *id.*, which—contrary to what Walgreens says—hasn't adopted such an exemption for these types of calls made to cell phones. Absent a similar regulation passed by the FCC or the FCC's adoption of the FTC's exemption, the Court need not give any deference under the Hobbs Act to the FTC's Telemarketing Sales Rule, which again, only applies to the Telemarking Sales Act. (As explained in further detail below, the FTC's exemption doesn't apply for the additional reason that Walgreens is not arguing that the calls at issue are "healthcare" related calls within the meaning of the TCPA. Rather, it seeks to have the calls classified as falling under the emergency purpose exception to the TCPA.)

Reason 2: In the brief stricken by the Court, Walgreens makes an incredibly misleading statement: that the FCC uniformly adopted the FTC's exemption with respect to calls to cell phones. That's not true. Instead, in its 2012 order, the FCC was clear in making an exemption for healthcare-related calls to *residential* phone lines—not to cell phones. *See In re Rules & Regulations Implementing the Tel. Consumer Prot. Act*, 27 F.C.C. Rcd. 1830, 1853 (2012) ("[C]onsistent with the FTC's action, we exempt from our…requirements applicable to prerecorded calls all health care-related calls *to residential lines* subject to HIPAA.") (emphasis added). Indeed, elsewhere in the 2012 order, the FCC expressly stated that it "continue[s] to require some form of prior express consent for autodialed or prerecorded non-telemarketing calls to wireless numbers." *Id*. at 1842. Thus, while the FCC adopted the FTC exemption for calls to residential landlines, it specifically did *not* do so for calls to cell phones, the only calls at issue here.[1]

Reason 3: The issue before the Court on Walgreens' motion to dismiss is not whether the prescription refill calls at issue here constitute healthcare-related calls, but whether they fall within the emergency purpose exception to the TCPA. All that Walgreens can cite to support its argument that the subject calls fall within that exception is the definition of the exception itself, which merely states that "[t]he term emergency purpose means calls made necessary in any situation affecting the health and safety of consumers." 47 C.F.R. § 64.1200(f)(4). But as the Court recognized at oral argument, Walgreens can't rely solely on that language because "the definition is so general that…anybody that makes an automated phone call could come within it." (Transcript of July 22, 2014 Hearing, at 24:24 – 25:1, attached as Exhibit 1.) Moreover, Walgreens argues that the calls fall within the emergency purpose exception merely because they have been found to serve the public interest, but as the Court also recognized, "the statute doesn't say any call that serves the public interest is permissible. It says a call for an emergency purpose." (*Id.* at 25:22 – 24.) Walgreens hasn't come close to showing the calls fall within the emergency purpose exception, which despite the shift in focus to healthcare-related calls, is the

[1] Even if it wanted to, the FCC could not exempt healthcare-related calls to cell phones from the TCPA's consent requirement. While the TCPA expressly allows the FCC to exempt non-commercial calls to residential landlines from the statute's prohibitions, 47 U.S.C. § 227(b)(2)(B), the FCC's authority to exempt calls to cell phones is limited to calls that are not charged to the party. 47 U.S.C. § 227(b)(2)(C). Accordingly, in setting out the exemption for healthcare-related calls to residential landlines in the 2012 order, the FCC cited only section (b)(2)(B), not (b)(2)(C), for its statutory authority to do so. *See* 27 F.C.C. Rcd. at 1852-53.

only exception at issue here.

Finally, the Court's recognition that all healthcare-related calls cannot be considered emergency calls is supported by the fact that the FCC created a healthcare exception for calls to residential landlines. If all healthcare-related calls (such as prescription refill calls) constituted an emergency purpose, there would be no need for a separate exception. *See* 47 C.F.R. § 64.1200(a)(3) (prohibiting calls to residential landlines using autodialers or prerecorded messages "unless the call…(i) [i]s made for emergency purposes…or (v) [d]elivers a 'health care' message…."). Thus, FTC rules on healthcare-related calls have no bearing on the issue before this Court because whether the calls in question are healthcare-related is irrelevant to whether they fall within the TCPA's emergency purpose exception.

* * *

In short, because the authority cited by Walgreens creates an exception (i) to an FTC rule that is not at issue here, rather than to the TCPA, (ii) that has not been (nor could it be) adopted by the FCC with respect to calls to cell phones, and (iii) that is otherwise irrelevant to determining whether the prescription refill calls in question here fall within the TCPA's emergency purpose exception, it need not be considered by the Court.

Respectfully submitted,

ROBERT KOLINEK, individually and on behalf of all others similarly situated,

Dated: August 5, 2014

By: /s/ Benjamin H. Richman
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CERTIFICATE OF SERVICE

I, Benjamin H. Richman, an attorney, hereby certify that I served the above and foregoing ***Plaintiff Kolinek's Response to Walgreens' Citation of Authority***, by causing a true and accurate copy of such paper to be filed and transmitted to all counsel of record via the Court's CM/ECF electronic filing system, on this the 5th day of August 2014.

/s/ Benjamin H. Richman